FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Getman and Commissioners Downey, Knox, Scott and Swanson

From: C. Scott Tocher, Commission Counsel
Luisa Menchaca, General Counsel

Re: Prenotice Discussion of Regulatory Action Regarding Section 85702, Contributions from Lobbyists

Date: August 31, 2001

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As the Commission is well aware, passage of Proposition 34 brought significant changes to various aspects of the Political Reform Act ("Act"). Among those changes is a new statute, Section 85702 of the Government Code. Generally speaking, the new law prohibits certain but not all campaign contributions from lobbyists to those the lobbyist is registered to lobby. The statute also prohibits an elected state officer or candidate for elected state office from accepting a contribution made by such a lobbyist. Determining when a lobbyist "makes" a contribution is an important regulatory issue.[1]

INTRODUCTION

Proposition 34 added Section 85702 to the Act:

> "An elected state officer or candidate for elected state office may not accept a contribution from a lobbyist, and a lobbyist may not make a contribution to an elected state officer or candidate for elected state office, if that lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer."

Section 82024, already part of the Act, defines "elective state office" as follows:

> "'Elective state office' means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature, member elected to the Board of

[1] Section 85702, as the Commission is aware, is the subject of litigation involving this agency. In *Institute of Governmental Advocates v. Fair Political Practices Commission, et al.*, CIV. S-01-0859, a lobbyist interest group is challenging in federal court the constitutionality of the ban imposed by Section 85702. That matter is pending before the Honorable Frank Damrell, Jr., of the United States District Court, Eastern District of California.

> Administration of the public Employees' Retirement System, and member of the State Board of Equalization."

Proposition 34 repealed former Section 85704, a similar prohibition enacted with passage of Proposition 208 and later enjoined by a federal court. Section 85704 prohibited campaign contributions and officeholder account contributions "from, through, or arranged by" a state or local registered lobbyist.[2] Section 85702, in contrast, does not prohibit contributions "through" or "arranged" by a lobbyist.[3]

The intent of this provision is to prevent actual and apparent corruption and undue influence by largely severing the tie between lobbyists and fundraising by candidates.[4] The prohibition in Section 85702 covers campaign contributions but only refers to lobbyists. "Lobbyist," "lobbying firm," and "lobbyist employer" are all terms with specific meanings in the Act. Therefore, Section 85702, on its face, applies only to lobbyists.[5]

Presumably, contributions "from" a lobbyist are those made with the lobbyist's personal funds. This presumption is based in large part on the historical development of the prohibition, as discussed below. Essentially, earlier provisions which banned lobbyists from advising clients and others on contributions from client funds either were declared unconstitutional or enjoined from enforcement.[6]

The Lobbyist Contribution Ban, Historically

Prior even to Section 85704 (of Proposition 208) and now Section 85702 (of Proposition 34), the Act in 1974 had a provision, 86202, which also addressed lobbyist contributions:

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[2] Former Section 85704 read:
"**85704.** No elected officeholder, candidate, or the candidate's controlled committee may solicit or accept a campaign contribution or contribution to an officeholder account from, through, or arranged by a registered state or local lobbyist if that lobbyist finances, engages, or is authorized to engage in lobbying the governmental agency for which the candidate is seeking election or the governmental agency of the officeholder."

[3] Note also that the prohibition of former Section 85704 also applied to "registered … local lobbyist." The Act otherwise does not make (nor made after Proposition 208) reference to or provision for locally registered lobbyists. Thus, this provision applied to "local" lobbyists if the local jurisdiction adopted a lobbyist registration scheme. In contrast, Section 85702 makes no such provision for local lobbyists.

[4] Under the Act, a "candidate" includes officeholders. (§§ 82007, 84214; Reg. 18404, subd. (d).)

[5] Staff recently came to this conclusion in *Churchwell* Advice Letter, A-01-115. A copy is attached hereto as Attachment 1.

[6] Staff also has advised that the statute's effective date is January 1, 2001, for a lobbyist and November 6, 2002, for statewide elective officeholders and candidates. (*Boyer* Advice Letter, A-01-106.)

> "**86202.** It shall be unlawful for a lobbyist to make a contribution or to act as an agent or intermediary in the making of any contribution, or to arrange for the making of any contribution by himself or by any other person."

The Commission originally interpreted the "to arrange for" language in Section 86202 to forbid a lobbyist from advising his or her employer to make a contribution, if that advice "was a causal element" in the making of the contribution. (*Institute of Governmental Advocates v. Younger* (1977) 70 Cal.App.3d 878, 881.) A Superior Court enjoined the Commission from enforcing this interpretation because it violated the First Amendment speech rights of the lobbyist and lobbyist's employer; the Second District Court of Appeals affirmed. (*Id*., at p. 884.)

Section 86202 eventually was declared unconstitutional in *Fair Political Practices Commission v. Superior Court* (1979) 25 Cal.3d 33, 45, on the ground that the prohibition against the making of contributions by lobbyists impermissibly infringed the lobbyists' First Amendment right to associate with candidates by making contributions. Specifically, the court found that there was a compelling state interest for the rule, namely "...rid[ding] the political system of both apparent and actual corruption and improper influence." The court also found, however, that the rule was not narrowly tailored to serve that interest for three reasons: (1) the rule barred all contributions to all candidates, even ones the lobbyist might never have opportunity to lobby; (2) "lobbyist" was defined broadly in the Act; and (3) the rule did not distinguish between large and small contributions. (*Id*.) Section 86202 was repealed in 1984. (Stats. 1984, ch. 161.)

More narrowly tailored, Proposition 208's Section 85704 was enjoined by a federal court in January 1998, along with many other provisions of that proposition. Section 85704 prohibited only contributions from a lobbyist "who finances, engages in or is authorized to engage" in lobbying of the agency associated with the recipient. That statute, unlike the current Section 85702, barred not only contributions *from* a lobbyist but also contributions "*through or arranged by*" a lobbyist. Prior to the injunction of Section 85704, the Commission adopted Regulation 18626 interpreting "from, through, or arranged by" a lobbyist. (Attachment 2.) This regulation was repealed by the Commission, along with other Proposition 208 regulations, in May of this year.

Section 85702, In Contrast:

As described earlier in this memorandum, Section 85702 prohibits lobbyists from making contributions to candidates and officeholders they are registered to lobby. Again, Section 85702 states:

> "**85702.** An elected state officer or candidate for elected state office may not accept a contribution from a lobbyist, and a lobbyist may not make a contribution to an elected state officer or candidate for elected state office, if that lobbyist is registered to lobby the

> governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer."

Section 85702 differs from previous incarnations of the lobbyist prohibition in several important ways.

First, Section 85702 is narrowly tailored to prohibit only contributions from lobbyists who engage in lobbying of the agency associated with the recipient (as opposed to the Act's original prohibition of *all* lobbyist contributions in Section 86202). Thus, Section 85702 is much more narrowly focused on preventing "apparent and actual corruption and improper influence."

Second, unlike Proposition 208's Section 85704, Section 85702 does *not* prohibit contributions "through, or arranged" by a lobbyist. Rather, the prohibition of Section 85702 is narrower and applies only to contributions made by a lobbyist. Thus, lobbyists are free to advise their clients about client campaign contributions.

PROPOSED REGULATION

There are several points at which Section 85702 requires clarification. Among other things, described in greater detail below, the regulation defines how a contribution is made, limits the scope of contributions to use of the lobbyist's personal funds, identifies the scope of activities reached by Section 85702, and sets forth a method for determining the agency a lobbyist is registered to lobby. Proposed Regulation 18572, Attachment 3, is discussed below.

Subdivision (a): Elemental to understanding and applying the statute is a definition of what it means to "make" a contribution, and what a "contribution" is. This subdivision describes the elements of the act of making a contribution and refers to the Commission's definition of "contribution" contained in Section 82015 and Regulation 18215. In so doing, the proposed regulation uses existing principles already interpreting similar provisions in the Act.

This subdivision also expressly limits the statute's contribution ban to the lobbyist's use of personal funds. This interpretation, as indicated earlier, is based on the narrower language of the statute when compared to its earlier incarnations. Because the statute no long applies to "arranging" contributions by others, it seems logical that the ban applies only to the lobbyist's personal funds.

Reference also is made to Regulation 18533, which governs contributions made from joint checking accounts.[7] Because it is conceivable that a lobbyist's spouse, or

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[7] Regulation 18533 states:

"**18533. Contributions from Joint Checking Accounts**

"(a) A contribution made from a checking account by a check bearing the printed name of more than one individual shall be attributed to the individual whose name is printed on the check and who signs the check, unless an accompanying document directs otherwise. The document shall indicate the amount to

another, may wish to make contributions, the proposed regulation refers to the Commission's established treatment of such contributions.

Subdivision (b): This subdivision warns that the aggregation rules contained in Section 85311, "Affiliated Entities, Aggregation of Contributions," apply in the context of the lobbyist contribution ban, as well. While Section 85702, the lobbyist contribution ban, does not refer to contributions from lobbying firms or other entities a lobbyist may control, Section 85311 applies "for purposes of Chapter 5," of which Section 85702 is a part. In essence, this subdivision says that contributions that otherwise might be permissible under subdivision (a) of the regulation (because the contribution does not involve "personal funds") may nevertheless be barred by virtue of Section 85311. In general, Section 85311 aggregates contributions made by an individual with those contributions that are directed and controlled by the same individual (but on behalf of a company, for instance). Interpretation of Section 85311 is part of the Commission's regulatory calendar for this year. Depending on the outcome of that project, it is possible the Commission may be faced with a determination that contributions made by a lobbying firm are prohibited where the firm is controlled by a lobbyist and the contribution is intended for a candidate the lobbyist is registered to lobby.

Subdivision (c): This proposed subdivision specifies the circumstances under which a lobbyist may contribute to political parties or general purpose committees (commonly referred to as PACs). Some observers have expressed the opinion that the statute applies *only* to the lobbyist's use of personal funds, not those funds over which he or she may have control (which may not be personal funds), nor to those funds which the lobbyist has contributed to another person or group. On the latter point, because money is fungible, so the argument goes, the lobbyist no longer has any control over the funds and is no longer identified with the group's use of the funds. Thus, there should be no prohibition of any kind against lobbyist contributions to primarily formed committees, general purpose committees or political parties.

On the other hand, it is suggested that the appearance of corruption that the statute was created to address persists where a contribution from a lobbyist ends up in the pocket of a candidate in such a manner that the lobbyist might become known to be the source of the funds. For instance, several lobbyists might contribute to a political action committee that contributes in turn to candidates for state elective office. If the lobbyists are

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be attributed to each contributing individual and shall be signed by each contributing individual whose name is printed on the check. If each individual whose name is printed on the check signs the check, the contribution shall be attributed equally to each individual, unless an accompanying document signed by each individual directs otherwise.

"If the name of the individual who signs the check is not printed on the check, an accompanying document, signed by the contributing individuals, shall state to whom the contribution is attributed.

"(b) For purposes of this regulation, each contributing individual is a 'person' as defined in Government Code section 85102(b) and is subject to the contribution limitations set forth in Government Code section 85305(c)(1).

"(c) If the individual who signs the check or accompanying document is acting as an intermediary for another contributor, this regulation shall not apply and Regulation 18432.5 shall apply instead."

registered to lobby the Legislature, then personal contributions to the respective candidates would be prohibited by Section 85702. Subdivision (d) addresses this situation. **Option "1A"** states contributions to such entities are allowed, so long as the contributions are not made for the purpose of supporting or defeating candidates or officers they are registered to lobby. Such intent must be indicated on the check or transmitting document. **Option "1B"** states that contributions to political parties and to other non-controlled committees are not prohibited so long as the committee is not primarily formed to support or oppose a candidate to whom the lobbyist would otherwise be barred from directly contributing.

The Commission also has a **third option**, to consider the need for a regulation concerning earmarking that would develop the concept contained in Option 1A. Section 85704, also part of Proposition 34, prohibits a form of earmarking where a donor makes a contribution to a committee with the agreement that it will be contributed to a particular candidate (unless the donor is disclosed as the source of the contribution). (§§ 85704 and 84302.) Section 85303, which describes the limits on campaign contributions to committees and political parties, allows a form of earmarking, in the sense that a contributor may donate a certain amount to a political party for purposes of contributions to candidates, and another, unlimited amount to the party for "other" purposes. The Commission may wish the lobbyist issue to be addressed in a regulation or regulations that more clearly describe permissible circumstances of "earmarking" for all persons.

Subdivision (d): This subdivision adds nothing substantial but reiterates the limited reach of Section 85702, listing conduct the statute does not prohibit. For instance, case law has established the right of individuals to volunteer time on behalf of a given candidate. Such activity generally cannot be limited through a contribution limit statute. This proposed subdivision emphasizes, consistent with that law, that Section 85702 does not preclude a lobbyist from volunteering his or her own time on behalf of *any* candidate for office, regardless if the lobbyist is registered to lobby that candidate's office or agency.[8] Also, the purpose behind Section 85702 is to prevent actual and apparent corruption and undue influence by contributions made by lobbyists to officials the lobbyist is registered to lobby. There is no danger of such corruption, however, where the lobbyist and the candidate are one and the same person. Thus, the subdivision clarifies that Section 85702 does not prohibit a lobbyist from contributing personal funds to his or her own campaign.

Subdivision (e): As with subdivision (d), this subdivision further clarifies the scope of Section 85702, in dictating that there is no prohibition under the statute regarding independent expenditures by a lobbyist on behalf of any candidate for elected state office.

Subdivision (f): This subdivision further illustrates the limited scope of Section 85702. Thus, we see that a lobbyist registered to lobby agencies of the executive branch

[8] The term "candidate" includes officeholders, even though a given officeholder may not be able to seek reelection. (See footnote 4, *supra*.)

(such as the Department of Education) of state government is *not* prohibited from contributing to candidates for statewide office (such as Controller or Attorney General) or the state Legislature *unless* the recipient *currently* is a member of the specific administrative agency the lobbyist is registered to lobby.

Subdivision (g): This subdivision provides a method for determining the agency a lobbyist is registered to lobby. Currently, a lobbyist may indicate on his or her Lobbyist Certification Statement (Form 604) those specific agencies he/she lobbies. (Attachment 3.) If the lobbyist does not list any agencies, the lobbyist will be registered to lobby all agencies identified on the Lobbyist Employer or Lobbying Firm Registration statement and all subsequent amendments. These agency identification requirements, which exist on Form 604, however, were derived from former Regulation 18626 (now repealed), which was a casualty of the repeal of Proposition 208's Section 85704. When the Commission adopted regulation 18626, which gave rise to the Form 604 amendments, the Commission adopted language similar to that proposed below in subdivisions (g)(1) and (g)(2). [9]

Proposed subdivision (g) provides two rules for determining when a given lobbyist is lobbying a given agency. Proposed subdivision (g)(1) would apply to lobbyists who work in lobbying firms. Lobbying firms are required to register and to make periodic reports. (§ 86104.) Among other things, lobbying firms must report the identity of each person for whom they lobby, and supply a "list of the state agencies whose legislative or administrative actions the lobbying firm will attempt to influence for the person." (§ 86104, subd. (d).) This list provides an objective means of identifying the agency or agencies the lobbyist of the firm is likely to lobby.

Proposed subdivision (g)(2) would apply to lobbyists working for lobbyist employers. Lobbyist employers are required to register and to make periodic reports. Among other things, lobbyist employers must report their "lobbying interests ... and a list of the state agencies whose legislative or administrative actions the lobbyist employer will attempt to influence." (§ 86105, subd. (e).) This list provides an objective means of identifying the agency or agencies the lobbyist is likely to lobby.

Attachments:
Regulation 18572
Former Regulation 18626
Form 604 and Instructions
Churchwell Advice Letter

[9] The lobbyist or lobbyist employer's identification of agencies is the only aspect of Form 604 implicated by former Regulation 18626.